

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11375 of 2005

For Approval and Signature:

HON'BLE MR JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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ATUL LIMITED - Petitioner(s)

Versus

**JUSTICE (R) B J DIWAN PRESIDING ARBITRATOR & 3 -
Respondent(s)**

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Appearance :

PARTY-IN-PERSON for Petitioner No(s).: 1.
MR.M.J.THAKOR, SR.Advocate with MR.K.M.Thakar, Advocate
for M/S TRIVEDI& GUPTA for Respondent No(s):1.
None for Respondent No(s).: 2,3.

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CORAM :HON'BLE MR JUSTICE DN PATEL

Date : 17/06/2005

ORAL JUDGMENT

Rule. Learned Advocate Mr.Thakar for M/s.Trivedi
and Gupta, Advocates waives service of notice of Rule.
Upon request of the party-in-person and advocate for
respondent, the matter is taken for its final hearing.
The present writ petition is filed under Article 226

and 227 of the Constitution of India for setting aside the order dated 13th June,2005 passed by respondent no.1, who was Presiding Arbitrator in dispute between the present petitioner and the respondent no.2.

2. The question of law involved in present petition is that whether the award passed by the Arbitrator is enforceable during the pendency of an application under section 34 of the Arbitration and Conciliation Act,1996 (hereinafter referred to as "Act") filed by respondent no.2 before the District Court, Valsad. The main thrust of the argument of the party-in-person or petitioner is that the amount awarded in the arbitration award, is at Rs.3,78,30,197/-, out of which, amount at Rs.1,20,70,955/- is required to be paid by the Presiding Arbitrator from the Escrow amount to the present petitioner. It is submitted by party-in-person that though application under section 34 of the Act is pending, the amount at Rs.1,20,70,955/- ought to be paid by the respondent no.1 from escrow account to the petitioner, mainly for the reason that the respondent no.2 has waived his right to oppose the encashment of the bank guarantee and waived his right to oppose the amount to be paid by the Presiding Arbitrator from Escrow account to the petitioner upon final decision by the Arbitrators. It is also submitted by the party-in-person that in pursuance of the order passed by the Division Bench of this High Court in First Appeal No.2121/2002 to First Appeal No.2123/2002 with Civil Application No.7311 and 7312 of 2002 dated 25th November,2002, the aforesaid amount of Rs.1,20,70,955/- ought to be paid by the respondent no.1 from Escrow account to the present petitioner. The respondent no.2

was already directed to allow the petitioner to receive the said amount upon finalization of the dispute by passing the final award. Final award is now passed by Arbitrators. The amount retained in Escrow account ought to be disbursed by the respondent no.1 to the petitioner. The pendency of application under section 34 of the Act,1996 can never be treated as bar for enforceability of the order passed by the Arbitrator. An application was moved by the present petitioner to the respondent no.1 on 13th June,2005 for releasing the aforesaid amount but the respondent no.1 was pleased to pass the following order dated 13th June,2005.

"In view of the application under section 34 filed before the District Court at Bulsar, this application is rejected."

Being aggrieved by this order, the present petition has been preferred. In fact, this amount ought to have been released by the respondent no.1 in favour of the present petitioner. The party-in-person appearing for the petitioner has also taken this Court to the details as to how the amount had gone to the Escrow account, as per the order of the Arbitrator dated 2nd October,2003, which is at Annexure "P-5" of the memo of present compilation. Party-in-person has vehemently submitted that the amount which is lying in the Escrow account is payable to the petitioner upon pronouncement of the arbitration award. An application under Section 34 of the Act cannot be bar to such type of payment by respondent no.1 to the present petitioner.

3. I have heard the learned Senior Advocate Mr.Mihir Thakor appearing for the respondent no.2, who has mainly submitted that against the award dated 15th

May, 2005 passed by the arbitrators, an application under section 34 of the Act has already been preferred before the District Court, Valsad and the said application is pending even as on today and, therefore, in view of the provision of section 36 of the Act, the award passed by the arbitrator is not enforceable and what is not enforceable is not executable. The learned counsel appearing for the respondent no.2 has relied upon several judgments, which are referred hereinafter. The main contention of the learned Senior Advocate Mr. Mihir Thakore is that when an application under section 34 of the Act, 1996 is pending, the amount lying in the Escrow account cannot be paid to the petitioner. It tantamounts to execution of the award. It tantamounts that the award has become enforceable but looking to the provision of the Section 36 of the Act, 1996, under which the petitioner is seeking the relief of getting the amount from Escrow account, is not enforceable. It is also submitted by the learned senior advocate that the present writ petition under Article 226 of the constitution of India is not tenable at law, mainly for the reason that the petitioner can initiate execution proceedings if at all, the award is executable. Prima facie, remedy lies at somewhere else. The execution proceedings are available to the present petitioner, even if the case of the petitioner is accepted by this Court. A writ petition against the respondent no.1, who is an Escrow agent is not tenable at law. It is also submitted by the respondent no.2 that there is no exception to section 36 of the Act, 1996. Once an application under section 34 of the Act, 1996 is preferred, the award will become enforceable only when such application being refused and,

therefore, present petition may not be entertained by this Court in exercise of an extra ordinary jurisdiction under article 226 and 227 of the Constitution of India.

4. Having heard the party in person for petitioner, learned advocate appearing for the respondent no.2 and looking to the facts and circumstances of the case and various judicial pronouncements delivered by the Hon'ble Apex Court (which are referred hereinafter), in my opinion, there is no substance in present petition and hence, it is required to be dismissed especially for the following reasons:-

(i) It is not in dispute that an application under section 34 of the Arbitration and Conciliation Act,1996, is pending before District Court, Valsad against the award dated 15th May,2005 passed by the Presiding Arbitrator.

(ii) The petitioner is seeking enforceability of award. The relevant part of the award, reads as under:-

"72. The claimant shall pay to respondent No.2 the net amount of Rs.3,78,30,197/- with 10% interest till payment. Against the said amount, Rs.1,20,70,955/- shall be paid by learned Presiding Arbitrator Justice B.J. Divan as on 14.4.2005 from the ESCRO account to respondent No.2....."

The aforesaid part of the award entitled the present petitioner to get an amount of Rs.1,20,70,955/- to be paid by the Presiding Arbitrator Justice B.J. Divan from Escrow account. The award passed by the arbitrator in the present case is not enforceable

during the pendency of the application under section 34 of the Act,1996. A thing which cannot be done directly, can never be done indirectly. As per the provision of Section 36 of the Act,1996 arbitration award is not enforceable and, therefore, cannot be made executable in exercise of an extraordinary jurisdiction under article 226 of the Constitution of India. What is prohibited by law, can never be permitted by the Court. Court cannot create an exception. Exception to be carved out under section 36 of the Act,1996 is the realm of legislature. Even for very good reason, the Court cannot recast, reframe and restructure the law. The party -in-person appearing for the petitioner insisted to read under section 36 of the Act,1996, which is not there in section 36 of the Act,1996. It has been also held by the Hon'ble Supreme Court between **Union of India and another V/s. Deoki Nandan Aggarwal**, reported in **AIR 1992 Supreme Court 96**, especially in para-14, which reads as under:-

"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recase or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."

(iii) The proposition of law canvassed by party in person for the petitioner, who is seeking enforceability of the award, when an application under section 34 of the Act is pending before the District Court, Valsad is not permissible in view of the decision rendered by the Hon'ble Supreme Court between **National Aluminium Co.Ltd. V/s. Pressteel & Fabrications (P) Ltd.**, reported in **(2004)1 Supreme Court Cases 540**, the relevant portion of para-10 reads as under:-

"... At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. But then we noticed from the mandatory language of section 34 of the 1996 Act, that an award, when challenged under section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant."

In the aforesaid judgement, it is expressed in para-11 of the judgment that there is an automatic suspension of the execution of the award, once an application challenging the said award filed under section 34 of the Act is pending. The amendment is also suggested but as stated herein above, especially in the

judgment delivered by the Apex Court, the Court cannot recast, reframe and restructure the law on its own. This interpretation of section 36 made by the Hon'ble Supreme Court is clearly suggestive of the fact that the amount awarded is not enforceable, once the application under section 34 of the Act is pending before the District Court.

(iv) It is also held by the Hon'ble Supreme Court between **National Buildings Construction Corporation Ltd. V/s. Lloyds Insulation India Ltd.**, reported in **(2005)2 SCC 367**, para-4 and 6 thereof reads as under:-

"4. The matter has been brought before this Court by the appellant inter alia on the ground that this Court had in National Aluminium Co.Ltd. V/s. Pressteel & Fabrications (P) Ltd. held on a construction of section 36 of the Arbitration and Conciliation Act, 1996, that there was no power in a Court to direct the execution of an award when an application under section 34 of that Act challenging the award was pending. Being prima facie satisfied with the submission of the appellant, we had stayed the operation of the impugned order of the Division Bench.

6. We are of the view that the award clearly states that after an adjustment of accounts, the only amount payable by the appellant to the respondent was Rs.4,11,756. How the arbitrator arrived at this figure is not for us to see. For the purposes of Section 36 of the Act, the court cannot be called upon to go behind the awarded amount and deal with the processes by which the amount was arrived at. There is on record only one award for the amount of Rs.4,11,756. Even though the respondent claims that the application under section 34 was filed in respect of the part of the award, it is in fact only a

process by which the arbitrator has arrived at the awarded amount. This would mean that the award as a whole cannot be enforced under section 36 of the Act. As held by this Court in National Aluminium Co.Ltd.. (SCC p.546, para 10)

"... the mandatory language of Section 34 (section 36) of the 1996 Act, that an award, when challenged under section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible."

(v) It has been held by the Hon'ble Supreme Court that during the pendency of an application under section 34 of the Act, the award becomes unexecutable. The petitioner is claiming the amount of Rs.1,20,70,955/- from Escrow account on the basis of the award. What is sought by the petitioner is nothing but the enforceability of the award. What is prayed by the petitioner is a part payment as decided by the arbitrator in the final award. The whole case of the petitioner is based on no other document than the award. The whole calculation is also given in the award. The petitioner is claiming Rs.1,20,70,955/- solely on the basis of the award. There is no other independent separate source of the right of the petitioner. This award is challenged under section 34 of the Act, 1996. Section 36 of the Act, 1996, reads as under :-

"36. Enforcement.- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

From the aforesaid provision, the right of the petitioner to get Rs.1,20,70,955/- has been suspended as the award is not enforceable under the proceedings initiated under section 34 of the Act.

(vi) The petitioner has also placed on record of this Court, the application preferred by respondent no.2 to Presiding Arbitrator dated 9th June, 2005 and has submitted that no such application was tenable but infact no order has been passed on application dated 9th June, 2005 preferred by the respondent no.2.

(vii) The petitioner has nicely argued that once the award is declared, no such application dated 9th June, 2005 (Annexure P-11 to the memo of present compilation) can be entertained by arbitrator. Upon the query raised by this Court to the Counsel of the respondent no.2, it is submitted that no order has been passed by arbitrator upon the said application. In fact, it is an application preferred by respondent no.2 before the Presiding Arbitrator to bring to their notice that under section 36 read with section 34 of the Act along with the aforesaid judicial pronouncements, make the proposition of law clear, that once an application under section 34 is pending, the arbitrator's award is not enforceable. The application

preferred by respondent no.2 dated 9th June,2005 before the presiding arbitrator is an over-causitious application. In fact there was no need to prefer such application. Though the proposition of law was very clear, an application was preferred for not to disburse an amount lying in the Escrow account.

(viii) There is no estoppel against law under section 36 of the Act,1996. The contention raised by the petitioner by reading the order passed by this Court in First Appeal No.2121/2000 dated 25th November,2002 to be read with the order passed by arbitrator dated 2nd October,2003, there is the estoppel on the part of the respondent no.2 to oppose the release of the amount, from the Escrow account, to the petitioner upon finalization of the account. This proposition of the petitioner is not accepted by the Court as there cannot be an estoppel against law. Hence, as stated hereinabove, section 36 of the Act has been also interpreted by judicial pronouncement. Once an application under section 34 of the Act,1996 is pending, the arbitration award is not enforceable. There cannot be estoppel against this law.

5. Looking to the facts and circumstances of the case, the present writ petition is not tenable at law. Even if, the case of the petitioner is taken at its highest pitch, then execution proceedings can be initiated. Even if all the arguments of the petitioner are accepted by the Court, writ is sought against the respondent no.1, who is an Escrow Agent. This Court is not inclined to issue any writ, order or direction to respondent no.1 for releasing the amount at

Rs.1,20,70,955/- from Escrow account to the petitioner especially, when an application under section 34 of the Act,1996 is pending, and in view of the provision of section 36 of the Act, and in view of the aforesaid judgment delivered by the Hon'ble Supreme Court.

6. In view of the aforesaid facts and reasons, there is no substance in the present petition and hence, it is hereby dismissed with no order as to costs. Rule discharged.

(D.N. PATEL, J)

(dipti)